1   UNITED STATES DISTRICT COURT
               WESTERN DISTRICT OF TEXAS

2   WACO DIVISION

3 NEONODE SMARTPHONE, LLC) Docket No. WA 20-CA-507 ADA
)

4 vs.   ) Waco, Texas
)

5 SAMSUNG ELECTRONICS CO.,)
  LTD., SAMSUNG ELECTRONICS)

6 AMERICA, INC.   ) July 7, 2023

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8   TRANSCRIPT OF MARKMAN HEARING VIA VIDEOCONFERENCE
        BEFORE THE HONORABLE ALAN D. ALBRIGHT

9

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25 Proceedings reported by computerized stenography,
    transcript produced by computer-aided transcription.

09:31:55	1	THE COURT: Jen, will you call the case, please.
09:31:57	2	THE CLERK: A civil action in Case 6:20-CV-507,
09:32:01	3	Neonode Smartphone, LLC vs. Samsung Electronics Co., Ltd.,
09:32:05	4	Et Al. Case called for a Markman hearing.
09:32:08	5	THE COURT: If I can have announcements from
09:32:10	6	counsel, please.
09:32:12	7	MR. MELTON: Yes, your Honor.
09:32:13	8	Brian Melton and with me from my firm is Rocco
09:32:16	9	Magni and Jeff Melsheimer. And we have co-counsel Philip
09:32:21	10	Graves and Greer Shaw. Mr. Shaw, Phillip Shaw and I will
09:32:25	11	do the presentation.
09:32:32	12	MR. GUARAGNA: Yes, your Honor.
09:32:33	13	John Guaragna from DLA Piper from Samsung. With
09:32:36	14	me from DLA are Mike Fowler, who will be handling the
09:32:39	15	argument for Samsung, Tiffany Miller and Brian Erickson.
09:32:43	16	Your Honor, we also have a number of representatives on
09:32:45	17	the line from Samsung, including several from Korea, and
09:32:49	18	did want me to pass along they greatly appreciate the Zoom
09:32:52	19	option, given the distance involved, having these Zoom
09:32:55	20	hearings is quite helpful.
09:32:57	21	THE COURT: I appreciate them attending and I
09:33:02	22	need to find how to do background like yours because I
09:33:05	23	know you're actually on holiday in Maine and you're not
09:33:09	24	really in a courtroom.
09:33:10	25	But be that as it may, we will take up first the

09:33:21 1 -- let's see, I know it has "option" in it. Give me one

09:33:24 2 second. I'm not going anywhere. I just have to switch

09:33:34 3 screens for a second. Okay. The first claim term is

09:33:39 4 "representation consists of only one option for activating

09:33:43 5 the function" and I'll hear from the plaintiff first on

09:33:46 6 this one since the preliminary construction is indefinite.

09:33:50 7   MR. MELTON: Yes, your Honor. Again, Brian

09:33:52 8 Melton.

09:33:53 9   Obviously I'd prefer to go second on this term,

09:33:56 10 but I understand your leaning against us on this one based

09:34:02 11 on the preliminary. Samsung claims that the language --

09:34:07 12   THE COURT: Mr. Melton, let me explain my world

09:34:09 13 view on this. Generally speaking, what I have found what

09:34:16 14 you are swimming upstream from is, I think on almost every

09:34:22 15 -- in every situation I found something is indefinite, I

09:34:24 16 find it is a grammatical issue, you know, where one can

09:34:28 17 argue in terms of the grammar, like here, with the word

09:34:32 18 "option," what that means. And so, that's -- it's not

09:34:37 19 really as much usually a technical issue as it is a

09:34:41 20 grammatical issue. So you might -- I don't know what

09:34:45 21 you're going say but that's my world view.

09:34:48 22   MR. MELTON: Your Honor, then I will skip along

09:34:52 23 and get to your world view. Can you see my screen, your

09:35:06 24 Honor, through a sharing?

09:35:07 25   THE COURT: Yes, sir, I can.

09:35:08   1   MR. MELTON: Okay.

09:35:14   2   THE COURT: Were you up late last night doing

09:35:16   3   these slides?

09:35:17   4   MR. MELTON: I was and I'll point out the one I

09:35:21   5   actually made so hopefully you're impressed with it.

09:35:25   6   Your Honor, we'll start with the claim language

09:35:28   7   since you're telling us it's a grammatical issue. We

09:35:35   8   think it's straightforward. The preamble says we have a

09:35:38   9   user interface. We color-coded in our brief the three

09:35:42   10 claim elements and I went ahead last night and separated

09:35:48   11 them even further. Remained the same color-coding and I

09:35:52   12 want to walk through them real quickly so we're talking

09:35:56   13 about the same thing.

09:35:58   14   The user interface is in the preamble. The 1a is

09:36:02   15 a touch-sensitive area, it's a representation of a

09:36:05   16 function is provided. So that's the first step. It's a

09:36:09   17 limitation on the representation of the function. And as

09:36:14   18 we say, the law is clear that when you use "a," it's one

09:36:19   19 or more, and so, this is a touch-sensitive area in which

09:36:24   20 one or more representations of one or more functions is

09:36:26   21 provided. I think that's relatively straightforward.

09:36:29   22   1b is the one we're in dispute about and that

09:36:34   23 one's in green. Wherein the representation consists of

09:36:41   24 only one option for activating the function. This

09:36:45   25 limitation states the characteristic of the representation

09:36:50   1   also.

09:36:50   2   Importantly, the word "consists of" when used in

09:36:53   3   a patent claim like this, it acts to limit what comes

09:36:58   4   immediately before, the representation. It doesn't limit

09:37:02   5   the one option. And that's the -- I mean, Samsung tangles

09:37:07   6   it up in their briefs but the law is clear on that. We

09:37:12   7   cited the Mannesmann vs. Engineered Metal case out of the

09:37:16   8   Federal Circuit, 1986 for that proposition. And so, it

09:37:20   9   does not limit the number of functions that may be

09:37:23 10   represented. That's what's claimed in 1a. And it doesn't

09:37:28 11   limit the number of ways or how to activate the function.

09:37:34 12   That's what's claimed in claim 1 -- in limitation 1c. And

09:37:39 13   so, we believe it was structured correctly and when it's

09:37:42 14   laid out and followed through, we do believe it's

09:37:47 15   grammatically correct.

09:37:48 16   1c goes on to explain how to activate the option

09:37:54 17   and it sets forth three steps, the touching, the gliding,

09:38:00 18   and then, what it can't do, a negative. It's not

09:38:04 19   relocated or duplicated. I don't think that's any longer

09:38:07 20   in dispute.

09:38:11 21   Now, I'm not putting this next slide up for you.

09:38:14 22   You know the law. I'm using it for me. Usually I put

09:38:18 23   one, two, three of what I'm going to talk about, but I'm

09:38:22 24   going to use this statement of the law and just highlight

09:38:24 25   what I'm talking about. So we're looking at whether the

09:38:28 1 claims are disclosed, what the invention is with

09:38:32 2 reasonable certainty to one skilled in the art, and not

09:38:37 3 particular claim terms. Says look at the spec. So let's

09:38:41 4 look at the spec. Samsung tells the Court that the

09:38:50 5 specification fails to explain what the representation

09:38:53 6 consists of. The actual specification proves Samsung

09:38:58 7 wrong. The spec in figure 1, which is on your screen,

09:39:01 8 discloses an embodiment of the claim. And to orient the

09:39:05 9 Court, it has six numbers on the right-hand side and three

09:39:09 10 across the bottom. One discloses the touch-sensitive

09:39:15 11 area. Two denotes the menu area. And three denotes the

09:39:21 12 display area. That's to the right.

09:39:22 13   THE COURT: Where's the option?

09:39:25 14   MR. MELTON: The option, your Honor, is when you

09:39:33 15 go to figure 3. And so, I just showed you figure 1.

09:39:40 16 That's the one in the middle of what is in front of you

09:39:42 17 right now. And you have 21, which is the function as

09:39:51 18 disclosed in the specification. The cross is a

09:39:57 19 representation of that function. And as disclosed, when

09:40:02 20 you put figure 1 and figure 3 together is -- and as

09:40:09 21 described below, that is how we get to the option.

09:40:14 22   And so, from working from left to right, you have

09:40:16 23 a phone, you have available applications on the phone.

09:40:20 24 Here, we say camera, contacts, e-mail, calculator. What

09:40:26 25 comes next is what is described and we'll read it in a

09:40:31	1	second. It's the option. The single app that is
09:40:36	2	currently active. That is the option. We don't use the
09:40:42	3	term "option." They beat us up on, well, the option's not
09:40:45	4	in the spec. I'll just -- I'll tell you and I'm going to
09:40:49	5	show you where option came from in a moment. But you
09:40:54	6	asked where's the option. The option is the single app
09:40:57	7	that is currently active. It's described in the spec and
09:41:01	8	I'll read it to you. It's right in front of you. Figure
09:41:04	9	3 shows that if the first function 21, which is in figure
09:41:07	10	1, is activated, then the display area is adapted to
09:41:12	11	display icons 211 through 216 representing services or
09:41:17	12	functions, depending on the current active application.
09:41:21	13	That is what the option is. That describes the
09:41:27	14	option. The word "option" is used in the prosecution
09:41:33	15	history to overcome the Hirshberg reference and we'll
09:41:35	16	discuss that later as to where it came from. But if
09:41:38	17	you're asking me where's the option, that's where it comes
09:41:41	18	from. That's where it's disclosed. And then, only one
09:41:51	19	application can be currently active, and therefore, it can
09:41:56	20	be the only option available when the function 21 is
09:42:03	21	activated.
09:42:04	22	So I believe this slide answers your question as
09:42:11	23	to what is the option. Figure 3 as the option is act --
09:42:23	24	yeah, as the function 21 is activated, figure 3 tells you
09:42:28	25	in the specification based on the currently active

09:42:33	1	application, based on that single option that's available,
09:42:37	2	figure 3 will change. Here, it has icon for a certain
09:42:44	3	application but according to the specification, whatever
09:42:50	4	-- if you pick e-mail, you're going to get different icons
09:42:53	5	because that would be the currently active application and
09:42:57	6	the sole option that could be activated by function 21.
09:43:02	7	Now, I know, I don't want to get beat up on this.
09:43:04	8	So figure 3 does not show icons for a camera app. It's
09:43:08	9	the one that's in the patent and I used it, but I don't
09:43:12	10	want to get -- from the other side, oh, they showed you a
09:43:18	11	figure that doesn't have camera icons. It's a different
09:43:20	12	app. But the disclosure in the patent is clear on this
09:43:26	13	that figure 3 will change, depending on which currently
09:43:29	14	active application is the option.
09:43:35	15	So we believe the specification clearly describes
09:43:41	16	the invention for one skilled in the art. And so, it
09:43:47	17	tells us to look at the prosecution history for how we got
09:43:51	18	here. And I believe -- we will cover right now about
09:43:57	19	where option came from. So if the plain language in the
09:44:03	20	spec aren't enough, the file history shows exactly what
09:44:06	21	the examiner was looking at when he allowed the language
09:44:09	22	in dispute.
09:44:11	23	In one of his last office actions, the examiner
09:44:13	24	said, Neonode, basically -- I'm paraphrasing -- I agree
09:44:18	25	what you've disclosed is novel but the way you're claiming

09:44:21   1   it, I'm rejecting it because it runs into this Hirshberg

09:44:26   2   patent. The resulting amendment to the claim were made to

09:44:30   3   accurately cover this specification and to get around

09:44:34   4   Hirshberg's multifunction keys. What I've got in front of

09:44:38   5   you, your Honor, is Hirshberg, figure 1 of Hirshberg. It

09:44:44   6   look like one of those old landline telephones with the

09:44:48   7   numbers and letters and keys on it. They adapted it to a

09:44:53   8   touchscreen. It had 13 four-way soft keys, one three-way

09:44:59   9   soft key at the bottom middle, and one single-function

09:45:03   10 key. The Hirshberg specification explained figure 1 here

09:45:14   11 and the sole one-function key was activated by pushing it

09:45:20   12 the old-fashioned way. All of the multifunction keys

09:45:26   13 required the user to know a direction, something the

09:45:29   14 Hirshberg patent calls a tilt and where to touch the icon

09:45:32   15 to get the required function out of these multifunction

09:45:36   16 keys. Squirrely, whatever you had to do, that is what the

09:45:42   17 examiner was looking at in the final office action.

09:45:46   18   In response to the office action, they said

09:45:52   19 you've got something novel, we're going to claim it the

09:45:54   20 right way. This is the amendment and you can see they

09:46:00   21 weren't hiding anything from the examiner. They scratched

09:46:03   22 through the parts that he said ran into Hirshberg and

09:46:08   23 inserted the "wherein the representation consists of only

09:46:12   24 one option for activating the function."

09:46:19   25   Their written response that went along with those

09:46:22   1 amendments was very clear. They were not talking about

09:46:28   2 how the function was activated or how many function --

09:46:32   3 they were talking about how many functions. And so, they

09:46:38   4 added the only one option language and explained that each

09:46:42   5 of the representations 21 through 23, and these are quotes

09:46:48   6 right out of the document, consists of the one option for

09:46:52   7 activating the corresponding function. And then,

09:46:56   8 characterized representations 21 and 23 out of that figure

09:47:00   9 1 as these one-option elements before they were stating

09:47:05   10 that they were activated by the touch-and-glide operation.

09:47:11   11 So the amendment the examiner got along with what they

09:47:15   12 told them looked to how many functions could be activated,

09:47:18   13 not how they were activated.

09:47:27   14   And one last thing, before I move on from the

09:47:30   15 file history support for this term, they make a big deal

09:47:33   16 that option's nowhere in the spec, this is -- you know, it

09:47:38   17 has no meaning. Of course it wasn't. I mean, the spec

09:47:44   18 was filed years before this examiner threw Hirshberg in

09:47:47   19 their face. The specification describes the one option,

09:47:52   20 only one option function keys, but it didn't use the

09:47:56   21 language. I showed you the language, I showed you the

09:47:59   22 spec in figure 3.

09:48:01   23   So where did the word "option" come from? This

09:48:05   24 is paragraph 82 in front of the Court. Eighty-two out of

09:48:09   25 the Hirshberg reference. So the examiner puts Hirshberg

09:48:12	1	in front of him, says you have something novel but you're
09:48:16	2	running into this guy, and so, they read Hirshberg and
09:48:23	3	there it is. They pulled "option" right out of the
09:48:26	4	Hirshberg spec using the basic principle of having soft
09:48:30	5	key selected by the initial contact point on any location
09:48:34	6	on the key, then selecting one of several options based on
09:48:39	7	the trace. That came right out of Hirshberg. So we
09:48:44	8	lifted the word "option" to describe what we were doing
09:48:49	9	differently in our patent.
09:49:02	10	That was the complaint he read that Hirshberg
09:49:05	11	disclosed that the user could choose multiple functions
09:49:07	12	from each representation, the key by selecting one of
09:49:11	13	several options. So Neonode took the concept examiner
09:49:14	14	rejected based on and put it in the claim language. Our
09:49:20	15	patent allows only one option of what function -- when the
09:49:28	16	function is activated and it's talking about the
09:49:32	17	application that's attached to the function. I hope we've
09:49:38	18	solved the mystery of where the word "option" came from.
09:49:41	19	The law says a POSITA would understand. Let's
09:49:46	20	talk about a POSITA would have known reading these claims
09:49:51	21	back in 2002. They attached their declaration of Andy
09:49:57	22	Cockburn and 11 pages are dedicated to doing just the
09:50:00	23	opposite of what the Federal Circuit has directed, your
09:50:04	24	Honor. Rather than look at the claims in light of the
09:50:07	25	spec, file history, he conducts a narrowly focused

09:50:12   1   wordsmithing on various phrases to arrive at his

09:50:15   2   conclusory opinions and there they are. Let's step back

09:50:21   3   and do what the Federal Circuit said to do, which is think

09:50:25   4   like a POSITA. What would a skilled artisan have known

09:50:30   5   the state of the telephone art be in 2002? Only 11 pages

09:50:35   6   for this. Here's the slide with the best five selling

09:50:38   7   phones from back then. You can see them. You remember

09:50:41   8   them. They were all push button. There was no touch

09:50:44   9   screen. And that's Samsung's '02 offering right in the

09:50:50 10   middle. This was five years before the Apple iPhone came

09:50:56 11   out and about seven before Samsung's offering came out

09:51:03 12   that piggybacked off of Apple.

09:51:05 13   So when the POSITA looked at these phones and the

09:51:08 14   879 patent, they would understand that the representations

09:51:13 15   represented a sole option for activating the function.

09:51:20 16   And that how it was activated is described in 1c. It was

09:51:27 17   novel then, it was recognized by the examiner. Industry

09:51:31 18   publications we've attached to our brief touted it and

09:51:35 19   Samsung, who clearly has POSITAs on staff, hundreds of

09:51:41 20   them, they took a license in 2005, signed it with Neonode

09:51:45 21   for this groundbreaking technology.

09:51:49 22   When we retained to point out the unreliability

09:51:54 23   and inconsistencies with Mr. Cockburn's declarations, we

09:51:59 24   retained Craig Rosenberg. He's designed user interfaces

09:52:03 25   for Boeing, AT & T, six other companies. He's a POSITA

09:52:07   1   under whatever definition has been submitted to the Court.

09:52:09   2   I think there's two competing. His declaration, Exhibit 2

09:52:13   3   to our brief, goes through each of Mr. Cockburn's

09:52:17   4   assertions and shows how they're wrong. I'm happy to go

09:52:20   5   into all of them. I don't think that's a good use of our

09:52:24   6   time. But there is one that drives Samsung and Mr.

09:52:29   7   Cockburn's opinions that I think I should take on right

09:52:35   8   now and it's this.

09:52:43   9   There are drawings and various interpretations of

09:52:48   10 their drawings to tell the Court, oh, there's three

09:52:51   11 different ways this could be interpreted. And when I

09:52:55   12 first read their brief, I thought wow, these are good

09:52:59   13 diagrams. Did these come out of Hirshberg or our patent?

09:53:03   14 And Mr. Rosenberg said no. Cockburn drew them. These are

09:53:07   15 all his diagrams. I said all right. Well, what about

09:53:12   16 these definitions? Have we ever used any of these

09:53:16   17 interpretations in front of the examiner, in front of an

09:53:21   18 IPR, any of them? No. We've never asserted one of those.

09:53:28   19 And so, I said all right. Which one do we agree with?

09:53:33   20 Again, none. We don't agree with any of these.

09:53:36   21   So Samsung sets up these three straw-man

09:53:40   22 arguments to further their argument that, oh, this is just

09:53:44   23 confusing. Let's go through them. Take the first one.

09:53:49   24 They say the representation represents a single function

09:53:52   25 and there is only a single option for how to activate the

09:53:55	1	function. Then in parentheses, they say what they really
09:53:59	2	mean. Example, only one specific input gesture such as
09:54:04	3	tap or drag left will activate function. As we've
09:54:07	4	discussed previously, that one's wrong because the
09:54:10	5	function language in limitation A means one or more of the
09:54:13	6	recited ways. So limitation A as would be understood by
09:54:17	7	the examiner and a POSITA would mean a touch-sensitive
09:54:22	8	area in which one or more representations or one or more
09:54:24	9	functions is provided. So one can't be right.
09:54:28	10	Take the second one. They say the representation
09:54:31	11	may represent multiple functions, but there is only a
09:54:36	12	single option for how to activate one particular function.
09:54:40	13	And then, they tell you their examples. It screws it up.
09:54:44	14	Only one specific input gesture will activate one
09:54:49	15	function. But if the representation also represents a
09:54:52	16	second different function, then only a second different
09:54:55	17	input gesture will activate that function. That one's
09:54:58	18	wrong because it does not account for the language
09:55:01	19	limitation in 1b, which restricts the options that can be
09:55:05	20	activated at any time.
09:55:12	21	So the third one, they say the representation
09:55:16	22	represents a single function and the claim allows for
09:55:20	23	multiple options for how to activate the function. And
09:55:24	24	then, there's their example, any input gesture such as tap
09:55:28	25	or drag in any direction will activate the single

09:55:31   1   function. That one's wrong, too. Limitation 1b does not

09:55:38   2   require that the representation represent a single

09:55:41   3   function for all time. That is clear in the figures and

09:55:45   4   the spec where it is expressly discussed a representation

09:55:50   5   representing different functionality, depending on which

09:55:53   6   application is open on the phone. This one's wrong for

09:55:57   7   another reason and this shows how far they'll go to

09:56:01   8   stretch to get three interpretations. No POSITA would

09:56:05   9   read only one to refer to the activation gesture let alone

09:56:08   10 multiple ones.

09:56:09   11   And, your Honor, because you focused me earlier

09:56:14   12 on your concerns, I blew past this and I want to make sure

09:56:29   13 I cover it because it goes to what I just said. When

09:56:34   14 we're talking about figure 1, the first function in that

09:56:39   15 second paragraph, it says the first function 21 is a

09:56:41   16 general application-dependent function. And so, as I

09:56:45   17 showed you in the slide with figure 3, it can be any

09:56:51   18 application on the phone, whichever one's currently

09:56:56   19 active. And so, by doing that, necessarily the

09:57:06   20 specification -- it's inherent in the specification that

09:57:10   21 what you can activate with the function 21 can change,

09:57:15   22 depending on what is currently active.

09:57:20   23   And so, when we talk about their different -- and

09:57:27   24 they complain, oh, they say it has to stay the same, the

09:57:33   25 specification clearly shows at multiple points that what

09:57:37   1   can be activated, the application can change. And so,

09:57:44   2   obviously the functionality would change with the

09:57:47   3   application.

09:57:52   4   THE COURT: Mr. Melton, if you could hold on just

09:57:55   5   one second, I need to check something. I'll be right

09:57:57   6   back.

09:57:57   7   MR. MELTON: Okay.

09:58:18   8   THE COURT: Okay.

09:58:19   9   MR. MELTON: All right, your Honor. One minute

09:58:22   10   and I'm going to stop. I'd like to take on, lastly, their

09:58:25   11   misguided attempts to say IPR counsel contradicted what we

09:58:30   12   told the examiner of the 879 or what we're telling you

09:58:34   13   today. Best way to do it is not to play games,

09:58:37   14   cherry-pick quotes, phrases out of context. It's to show

09:58:40   15   you what we presented at the IPR. Not some out-of-context

09:58:48   16   quote or some potentially vague statement.

09:58:54   17   But when submitted -- when we submitted things in

09:58:57   18   writing to IPR judges, they are consistent with what we

09:59:03   19   told the examiner. They are consistent with what we're

09:59:06   20   telling you today and it's consistent with what we wrote

09:59:10   21   in our brief.

09:59:10   22   What I've got in front of you is a slide from one

09:59:15   23   of the IPRs that we've shown to the judges that when

09:59:22   24   Samsung and others tried to attack this patent in the IPR,

09:59:28   25   it survived. It's clear. You can read it at the top, 879

09:59:32	1	specification. A representation may represent multiple
09:59:34	2	functions at different times but always provides one
09:59:38	3	option to the user at any time. And that's just what I
09:59:41	4	told you and that's why I went back to figure 1 in the
09:59:45	5	description of the application-dependent function.
09:59:53	6	Your Honor, the claim language, the
09:59:59	7	specification, file history, and the IPR all support a
10:00:03	8	plain and ordinary meaning construction of this term and
10:00:07	9	they're easy-to-understand words. I've showed you where
10:00:13	10	the "option" word came from and how it was understood by
10:00:17	11	others in the industry. This is supported by the
10:00:21	12	declaration of Craig Rosenberg and common sense. They've
10:00:26	13	failed to meet their burden to prove this is ambiguous or
10:00:32	14	let alone indefinite by clear and convincing evidence. We
10:00:37	15	would respectfully request the Court to take a couple
10:00:40	16	extra days, go back through our slides, look at slide 10
10:00:42	17	that I stayed up so late working on, and I think you'll
10:00:46	18	see that the preliminary construction isn't right and
10:00:52	19	should be changed. And I'll stop now.
10:00:55	20	THE COURT: I think that's the longest you've
10:00:59	21	ever gone. You must have had really exceptional
10:01:02	22	associates helping you on this one.
10:01:07	23	Mr. Fowler.
10:01:09	24	MR. FOWLER: Thank you. I'd like to share my
10:01:11	25	screen so if we could. Thank you, your Honor. Can you

10:01:27	1	see my screen?
10:01:29	2	THE COURT: All good.
10:01:31	3	MR. FOWLER: Thank you.
10:01:33	4	Your Honor, what I'd like to do is, I'd like to
10:01:36	5	start with where you began, which is the grammar issue.
10:01:43	6	Now, what we heard today about the language and about the
10:01:48	7	prosecution history and the specification included
10:01:52	8	statements I've never heard Neonode say before. They
10:01:55	9	didn't say it during original prosecution. They didn't
10:01:58	10	say it during the IPR. They didn't even say it in their
10:02:02	11	papers in front of your Honor. We've heard some things
10:02:05	12	today that are new that underscore the indefiniteness of
10:02:10	13	this language.
10:02:11	14	And let me start with, if I could, just give me a
10:02:15	15	second, see if I can get this up. Well, we'll just use
10:02:22	16	this view if it's okay with you. So I'm going to start
10:02:25	17	with the claim language. So it says the representation
10:02:27	18	consists of only one option for activating the function
10:02:30	19	and your Honor asked, well, what's the one function? And
10:02:34	20	one thing that we heard from counsel, which is quite
10:02:37	21	surprising, was he said that this language does not limit
10:02:41	22	the number of functions. He said this language does not
10:02:46	23	limit the function of gestures. Well, if that's the case,
10:02:51	24	then what does it limit? I mean, the implication is that
10:02:54	25	somehow it limits the representation, but that's an

10:02:57	1	argument that was never made in the prosecution history.
10:03:01	2	It was never made during an IPR. It's not even made in
10:03:04	3	their papers.
10:03:06	4	If it doesn't limit the functions and it doesn't
10:03:08	5	limit the gestures, then you're not using the language
10:03:11	6	only one option for activating to limit anything. And
10:03:15	7	then, what we heard today in terms of their response to
10:03:19	8	your question is, the only one option language refers to
10:03:26	9	one application being run at a time. That's an argument
10:03:29	10	that was never made in prosecution history or in the IPR
10:03:33	11	or in their papers, and it's nowhere to be found in the
10:03:37	12	specification or in the claim language. There's no way
10:03:39	13	you can stretch this claim language to say that the only
10:03:42	14	one option is to have only one application running at a
10:03:46	15	time. And I'll show you in a minute, your Honor, why the
10:03:49	16	specification proves that theory to be false. That can't
10:03:53	17	be what the only one option limits.
10:03:59	18	So let me go in that more. And, your Honor, I'm
10:04:04	19	mainly going to be just responding to Mr. Melton's
10:04:06	20	comments rather than going through our affirmative
10:04:10	21	argument. And of course, if your Honor has any questions,
10:04:12	22	let me know. But I thought that would be the best use of
10:04:14	23	the Court's time.
10:04:15	24	So what I have up now --
10:04:17	25	THE COURT: I think so, too.

10:04:19	1	MR. FOWLER: Sure. Thank you.
10:04:20	2	So I have up slide 6, which I suppose in some
10:04:23	3	ways is the counterpart to slide 10 that Mr. Melton showed
10:04:28	4	you in his deck, and what we see here is the
10:04:31	5	specification. And again, let me just say that there's
10:04:33	6	nothing in the specification that fixes the grammar
10:04:38	7	problem because the specification doesn't use the word
10:04:40	8	"option" as Mr. Melton conceded; and it doesn't talk about
10:04:43	9	this whole idea in any way of activating of -- the claim
10:04:51	10	language one option for activating. That's not in the
10:04:54	11	specification at all. So there's really no help in the
10:04:57	12	specification, but it clearly doesn't say what counsel was
10:05:01	13	saying.
10:05:02	14	Now, what counsel was suggesting is that you have
10:05:05	15	this function key 21 and that that function key is somehow
10:05:11	16	a multifunction -- a multifunction key that's somehow
10:05:15	17	limited to one function at a given time, which by the way,
10:05:19	18	your Honor, is inconsistent with what counsel said at the
10:05:21	19	beginning of his presentation when he says the claim
10:05:24	20	language doesn't limit the number of functions.
10:05:27	21	And what we see here is the full relevant part of
10:05:30	22	the specification, not just the part that Neonode showed
10:05:33	23	you. Function key 21 or icon, whatever you want to call
10:05:37	24	it, it does one thing. If you put your finger on it and
10:05:43	25	you activate it through a movement, it will always put up

10:05:49 1 figure 3 or some variation of figure 3. It does one

10:05:53 2 thing. It is not a multifunction key. It is something

10:05:57 3 that you can activate and will always put up a version of

10:06:00 4 figure 3 and that's regardless -- and this is what's

10:06:05 5 important, your Honor, because it just tears to shreds, I

10:06:08 6 think, what Mr. Melton said. It does it regardless of

10:06:11 7 whether there's an application running or not and how do

10:06:13 8 we know that?

10:06:14 9   Well, if you look at the specification cite on

10:06:18 10 the left and this is all from figure 4, the middle

10:06:21 11 language says that if there is -- if there is an

10:06:24 12 application running, then you get these icons 211, 212,

10:06:31 13 213, 214 and 215, which all represent different functions.

10:06:35 14 But then, it says in the part Neonode didn't show you, if

10:06:38 15 no application is currently active on the computer unit,

10:06:40 16 then you still get a bunch of functionality.

10:06:43 17   So the concept here of that this somehow turns on

10:06:47 18 the application being the option, which is not in the

10:06:51 19 claim language, it's not in the specification, and it

10:06:54 20 can't be read out of the specification because whatever

10:06:56 21 you do to that function icon 21, you're going to get that

10:07:00 22 display. And, your Honor, the delicious irony of all of

10:07:04 23 this of what they're arguing is that they say somehow that

10:07:08 24 claim limitation 1b, at least in their papers, not today

10:07:11 25 but in their papers, somehow limit the user to the ability

10:07:14   1   to only exercise one function.

10:07:16   2   But if you look at figures 1 and 3, what happens

10:07:19   3   is if you activate 21, you can pick from six different

10:07:23   4   functions. It's literally the opposite of what they're

10:07:27   5   arguing in their brief. And again, none of this deals

10:07:31   6   with the grammar issue because none of this in the

10:07:34   7   specification talks about option or one option for

10:07:38   8   activating and doesn't provide any clarity there.

10:07:40   9   Let's see, the next point I wanted to address in

10:07:44   10 the presentation had to do with what Mr. Melton did on

10:07:49   11 slide 16. And I don't have his slide in front of me, your

10:07:52   12 Honor, but that's the slide where he characterizes what

10:07:55   13 happened in Hirshberg. The first thing I would ask the

10:07:59   14 Court to note if we were to look at that slide again is

10:08:01   15 that Neonode tellingly doesn't actually give you any

10:08:05   16 quotes from the prosecution history from Hirshberg and

10:08:10   17 it's all attorney argument. And respectfully, the bullet

10:08:13   18 points in that slide are wrong. It's attorney argument

10:08:15   19 that incorrectly characterizes what happened in Hirshberg,

10:08:19   20 and it ignores the inconsistent statements that were made

10:08:23   21 during the prosecution of Hirshberg that are cited in our

10:08:28   22 brief.

10:08:28   23   And that's kind of the point of the prosecution

10:08:30   24 history. There's no disclaimer here, your Honor. I've

10:08:33   25 argued disclaimer in front of you a lot and the bar is

10:08:37 1 high for disclaimer. And if they're going to point to the

10:08:40 2 prosecution history as being the cure to the

10:08:42 3 indefiniteness, they're going to have to find something

10:08:44 4 that reaches the bar of disclaimer. And the fact that

10:08:47 5 within Hirshberg, the prosecution history of Hirshberg,

10:08:51 6 you've got different things being said, can't get you to

10:08:54 7 that bar.

10:08:57 8   And equally important, it ignores the fact that

10:09:01 9 whatever happened in Hirshberg, they said different things

10:09:05 10 also during the IPR. And I've got slide 7 up here and

10:09:08 11 this is one of the things that we're pointing to from

10:09:11 12 Exhibit 6. And counsel said, well, let's look at what was

10:09:17 13 shown to the patent office. I think what's important is

10:09:21 14 what the patent office is told.

10:09:23 15   And so, during the hearing, what they told the

10:09:25 16 patent office is what you see on the screen here. This is

10:09:28 17 from our Exhibit 6, pages 72 and 73 of the transcript, and

10:09:33 18 look what they said here. Says the point is at any given

10:09:37 19 time, the user is given only one option. Okay. So that

10:09:42 20 language is not in the specification but it's in the

10:09:45 21 claim. So what did they say it means? Only one option in

10:09:48 22 terms of what gesture to put in. So one gesture and we

10:09:53 23 just heard counsel say, well, that's craziness, but that's

10:09:56 24 not what they told the patent office less than a year ago.

10:09:59 25   They told the patent office that this language

10:10:02	1	referred to limiting the one gesture and what action to
10:10:05	2	take. So here, one of the options that they're saying is
10:10:09	3	it means one gesture and one action. And that wasn't some
10:10:13	4	kind of slip of the lip because look at what he says in
10:10:16	5	the following language. And I'm just going to paraphrase
10:10:19	6	here, but he's saying the genius at Neonode was that you
10:10:22	7	could limit yourself so you don't have to have a bunch of
10:10:24	8	different gestures. You can just use one gesture to
10:10:29	9	activate and that's one possible reading. That's Dr.
10:10:33	10	Cockburn, one possible reading of the claim.
10:10:37	11	In fact, this -- what is on this screen and this
10:10:42	12	is also teased out of Hirshberg is our option one in terms
10:10:46	13	of there's three options that Dr. Cockburn reads and he
10:10:50	14	says this is one way you could read the claim. I don't
10:10:54	15	have the slide up in front of me.
10:10:55	16	But the other thing I want to say, your Honor,
10:10:57	17	about the slides that were presented is, there was a slide
10:11:01	18	17 where they pointed to paragraph 82 of Hirshberg and
10:11:06	19	they said, well, look, that's where we got the option
10:11:11	20	language. Well, first of all, that -- I think that's a
10:11:19	21	new argument. I don't believe I've heard that before.
10:11:21	22	But regardless of whether it's new or old, this is not
10:11:24	23	something that they said in the file history to the patent
10:11:27	24	office. They said, well, this is where we got this from
10:11:30	25	and even if they did, what is on this slide shows that the

10:11:34	1	word "option" is not being used in the same sense that
10:11:37	2	it's being used here.
10:11:39	3	I'll read the sentence. It says using the basic
10:11:43	4	principle of having soft key selected by the initial
10:11:47	5	contact point on any location on the key, then selecting
10:11:50	6	one of several options based on the trace. And that's
10:11:53	7	where the highlighting ends. That's where counsel ended
10:11:55	8	the sentence. But it goes on to say -- and so, this is
10:11:58	9	what the option's referring to. One can modify the shape
10:12:02	10	of the key, the labelling logic, the numbers of functions,
10:12:06	11	the definition of the decision zones, and the decision
10:12:09	12	logic in several different ways. And if you look at the
10:12:13	13	language above what was quoted by counsel, this is talking
10:12:16	14	about how a software engineer would implement the key
10:12:21	15	itself. It's not talking about the claim language that
10:12:23	16	we're talking about here.
10:12:24	17	So this was not used somehow -- first of all,
10:12:30	18	it's not in the prosecution history as saying we're using
10:12:32	19	option in the same way that it's being used here, but it's
10:12:37	20	certainly not being used in the way that it's being argued
10:12:39	21	by Neonode now.
10:12:40	22	And then, the last thing I'd like to say to your
10:12:42	23	Honor -- forgive me for going on so long -- is I've got up
10:12:45	24	our slide 8 and so, this really goes to the, you know, the
10:12:52	25	nub of the gist. I'm not even sure what that means, but

10:12:55 1 it goes the heart of the matter. And we have here the

10:12:57 2 language the representation consists of only one option

10:12:59 3 for activating the function. So the question is, what

10:13:02 4 does only one option for activating mean? And your Honor

10:13:05 5 puts the finger right on it is this language itself

10:13:09 6 doesn't make any sense. It doesn't. And there's no way

10:13:12 7 that you can read this language in a way that makes sense

10:13:14 8 and that's what Samsung has said and that's what Dr.

10:13:17 9 Cockburn has said.

10:13:18 10 But, you know, we want to try to see if we can do

10:13:22 11 something with that language. And the thing is, you do

10:13:24 12 three things with it and the first one is the

10:13:26 13 representation consists of a single function and that's

10:13:30 14 saying that this option language is limiting the function

10:13:34 15 and there's only one way to activate it. And although

10:13:39 16 counsel said, well, that's just nonsense, that's exactly

10:13:41 17 what Neonode told the PTAB in 2022. I showed you on that

10:13:47 18 slide.

10:13:47 19 So that's option one. The second option is,

10:13:51 20 well, counsel said that can't be right because 1a permits

10:13:56 21 multiple functions. Okay. Well, if that's the case, you

10:14:00 22 can have multiple functions, but there's only single way

10:14:03 23 to activate any given function and that gives meaning to

10:14:09 24 language only one option for activating. But counsel

10:14:11 25 says, well, that's wrong, too, and it is inconsistent with

10:14:15 1 -- it's consistent with part of what they said during the

10:14:17 2 prosecution history, but it's inconsistent with others.

10:14:20 3   And then, we get to No. 3, which is, you're

10:14:23 4 limited to a single function but multiple options. And

10:14:26 5 then, I heard counsel say something that was surprising to

10:14:28 6 me there. He said, well, that can't be right because the

10:14:33 7 claims don't cover the use of multiple gestures. But just

10:14:39 8 a few minutes before that, he had told you with respect to

10:14:41 9 option one that the claim doesn't cover just using one

10:14:45 10 gesture.

10:14:46 11   So it's not clear to me how those inconsistent

10:14:48 12 statements can be reconciled. But in any event, the

10:14:51 13 bottom-line point is that language doesn't make any sense

10:14:54 14 on its face. There are multiple ways you could read it.

10:14:58 15 We've got three of them there. And then, Neonode comes up

10:15:01 16 with door No. 4 in their brief, which is that you have a

10:15:06 17 multifunction key that at any given time, which is another

10:15:09 18 concept that's nowhere to be found in the specification at

10:15:12 19 any given time will be limited to one function with

10:15:16 20 multiple gestures.

10:15:19 21   Today, we actually heard door No. 5, which is

10:15:23 22 that the option is limited to the one application. That's

10:15:28 23 the one application running. So for all of those reasons,

10:15:31 24 your Honor, this language can't with any certainty much

10:15:33 25 less reasonable certainty be determined, then the claim is

10:15:37	1	invalid. So we request that the Court maintain its
10:15:40	2	preliminary construction. Does your Honor have any
10:15:44	3	questions?
10:15:44	4	THE COURT: I don't.
10:15:46	5	MR. FOWLER: Thank you.
10:15:47	6	THE COURT: Mr. Melton.
10:15:49	7	MR. MELTON: Yes, your Honor. All right, your
10:16:40	8	Honor, here we go.
10:16:50	9	He jacked up a few things I said. I never said
10:16:52	10	only one application can be running at a time. That's --
10:16:56	11	directly would be contradicting the spec, which I'm
10:17:00	12	showing you now. The computer unit is adapted to run
10:17:02	13	several applications simultaneously and to present an
10:17:05	14	active application on top of any other application on the
10:17:08	15	display area. So I never said that.
10:17:17	16	The other thing, it doesn't limit functions. Let
10:17:26	17	me see. That's what he said that I said it doesn't limit
10:17:29	18	the functions. Figure 1, your Honor, the spec, it
10:17:47	19	discloses and shows you can have three representations at
10:17:52	20	a minimum because they're there, 21, 22 and 23,
10:17:55	21	representation of functions. I think what he's doing is
10:18:02	22	confusing functionality of applications with the word
10:18:07	23	"functions" as used in the specification and the claims.
10:18:15	24	He kept using them interchangeably. That's going to lead
10:18:20	25	to confusion. Functionality of an application is not how

10:18:25	1	function is described in the patent.
10:18:27	2	Twenty-one, 22, 23 describe the function as those
10:18:35	3	-- what's behind those icons. The right one is a file
10:18:41	4	manager, the middle one is a keyboard application, and 21
10:18:45	5	is a application-dependent. So I showed you the other
10:18:50	6	part of the specification where several applications can
10:18:56	7	run and the one that is currently active will be the one
10:19:02	8	that is associated with the functionality. The
10:19:06	9	functionality behind the function of representation 21.
10:19:13	10	And then, he made a big deal about, oh, if
10:19:16	11	there's no activate application, then, oh, it does
10:19:19	12	something. Yeah, the operating system is the default
10:19:22	13	application. So I don't think that's some novel argument
10:19:29	14	to defeat what I said. It has a default application if
10:19:33	15	nothing else is running.
10:19:38	16	Let's see. Your Honor, I want to go back to
10:19:52	17	this. I knew he'd bring it up. Mr. Hendifar submitted
10:19:58	18	slides, documents, and he's going to rely on one errant
10:20:02	19	statement possibly that I don't even think that's errant,
10:20:07	20	but let's look at it in context. It's at the very end of
10:20:10	21	his 45-minute presentation where he had submitted slide
10:20:13	22	after slide putting forth his position. And he says a
10:20:17	23	representation can at different times have multiple
10:20:20	24	functions. Yes. The point is at any given time, user's
10:20:23	25	given only one option in terms of what gesture to put and

10:20:26 1 what to -- and look what he does. He catches himself. He

10:20:30 2 says so the user, let me step back. And then, he explains

10:20:34 3 the prior art and then, he follows it up with exactly what

10:20:39 4 is contained in his slides. He didn't confuse the judges

10:20:43 5 as to his position by whatever that gesture comment was.

10:20:49 6 I mean, they were -- they had all these documents in front

10:20:53 7 of them. So they keep using this to disparage what

10:20:58 8 Hendifar said.

10:20:59 9   He follows it up and they cut it off after it's a

10:21:02 10 simple one-option activation. Right there. They cut it

10:21:05 11 off. But he goes on to explain exactly what I showed you

10:21:09 12 in his slides. You swipe, the device activate what it

10:21:14 13 activates, it can be one function or a different function,

10:21:19 14 but the user is given only one option in terms of what to

10:21:23 15 activate and what option to take.

10:21:27 16   So that statement, those slides, that is our

10:21:32 17 position. That was our position then, it hasn't changed.

10:21:36 18 And we believe if you take slide 10 that I made last

10:21:44 19 night, figure 3, and how we got to the word "option" in

10:21:48 20 the claim using the Hirshberg reference, the rejection and

10:21:55 21 how it made it into the claim, we think the Court can --

10:22:02 22 would find that this is definite and they haven't met

10:22:05 23 their burden of proving it's indefinite. So...

10:22:11 24   THE COURT: Okay. Let me see if I need anything

10:22:13 25 else. I'll be back in just a few seconds.

10:25:06	1	Okay. The Court is going to maintain its
10:25:09	2	preliminary construction of indefiniteness, which I don't
10:25:14	3	know the case well enough to know whether that means we do
10:25:18	4	or don't have to take up the second claim term.
10:25:22	5	MR. FOWLER: Your Honor, that would be
10:25:23	6	dispositive of the case on this patent. Samsung would be
10:25:27	7	prepared to rest on the other claim limitation in terms of
10:25:31	8	the presentation that we made. We don't -- I'm sorry, we
10:25:36	9	don't -- respectfully, we don't agree with the Court's
10:25:38	10	preliminary construction on that, but this would be case
10:25:41	11	dispositive.
10:25:42	12	THE COURT: Let me go ahead then up for the
10:25:44	13	record and say I'm going to enter on the other claim term
10:25:47	14	my preliminary construction, make it the final claim
10:25:50	15	construction just so that's not hanging out there.
10:25:53	16	So is there anything else we need to take up
10:25:56	17	today?
10:25:59	18	MR. FOWLER: No, your Honor.
10:26:00	19	MR. GUARAGNA: No, your Honor.
10:26:04	20	MR. MELTON: Your Honor.
10:26:05	21	THE COURT: I'm sorry you stayed up late --
10:26:07	22	MR. MELTON: My co-counsel and I are not sitting
10:26:09	23	next to each other so I can't slip him a note.
10:26:12	24	THE COURT: I feel bad about making you stay up
10:26:15	25	late and doing a slide and not prevailing.

10:26:18	1	MR. MELTON: Yeah.
10:26:19	2	THE COURT: Okay. So you guys have a good
10:26:21	3	weekend. Take care.
10:26:24	4	MR. MELTON: Thank you, your Honor.
10:26:25	5	MR. GUARAGNA: Thank you, your Honor.
10:26:25	6	MR. FOWLER: Thank you, your Honor.
	7	(Proceedings concluded.)
	8	
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3   UNITED STATES DISTRICT COURT  )

4   WESTERN DISTRICT OF TEXAS      )

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6      I, LILY I. REZNIK, Certified Realtime Reporter,

7   Registered Merit Reporter, in my capacity as Official

8   Court Reporter of the United States District Court,

9   Western District of Texas, do certify that the foregoing

10  is a correct transcript from the record of proceedings in

11  the above-entitled matter.

12     I certify that the transcript fees and format comply

13  with those prescribed by the Court and Judicial Conference

14  of the United States.

15     WITNESS MY OFFICIAL HAND this the 10th day of July,

16  2023.
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17   *Lily Iva Reznik*

18   ~~~~~~~~~~~~~~~~~~~~~~~~~
                                      LILY I. REZNIK, CRR, RMR
19   *Official Court Reporter*
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